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Supreme Court, U.S.
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No. 98-1504

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

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ROBERT L. COMEAUX,
*Petitioner,*

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERICIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Robert Comeaux, a dismissed, appointed union official can assert claims under Section 101 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 401) despite the fact that his rights as a union member were not affected by his dismissal.

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## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents United Food and Commercial Workers, Local Union No. 455; United Food and Commercial Workers International Union, AFL-CIO, CLC; and, Ray B. Wooster oppose Petitioner Robert L. Comeaux's Petition for Writ of Certiorari as follows:

## STATEMENT OF THE CASE

### A. Statement of Pertinent Facts.[1]

Petitioner Robert "Bob" Comeaux ("Comeaux") was employed by Respondent United Food and Commercial

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[1] Citations to the Record are designated thus ("R. at ——").

Workers Local Union 455. ("Local 455") as an appointed business representative from 5 August 1990 until 3 October 1992. (R. at 000141, 000450).[2] Comeaux was laid-off on 2 October 1992 because of Local 455's financial difficulties occasioned, in part, by its financial support of the striking Apple Tree grocery store chain employees, and the impending loss of Local 455's dues income from members employed by Apple Tree. (R. at 000142, 000147-000152).

According to Respondent Ray B. Wooster ("Wooster"), then President of Local 455, Comeaux was ". . . the least experienced business agent we [Local 455] had" and was on the bottom of Local 455's seniority list. (R. at 000148). Some Local 455 employees had already been laid off because of the Union's then deteriorating financial circumstances, and these same conditions necessitated Comeaux's lay-off. (R. at 000448, 000151).

Comeaux contended below that Local 455 laid him off because he had been diagnosed as a "workaholic" in 1991, and had consequently been ordered to limit his work time to no more than 45 hours per week. (R. at 000004, 000006, 000137). However, on December 27, 1991, Richard Elliott, the then-Executive Assistant to

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[2] The Statement of Facts in Comeaux's Petition is somewhat ambiguous in that it can be read to indicate that Comeaux, at the time of his termination, was an employee of Respondent United Food and Commercial Workers International Union, AFL-CIO, CLC ("International"). (Comeaux's Petition at xiii). Comeaux, at the time of his termination, was actually an employee of Local 455. (R. at 000141, 000450). Wooster made all employment decisions at issue regarding Comeaux. (R. at 000484). Wooster had not consulted the International regarding these decisions. (R. at 000484). There are no allegations of misconduct against the International except those alleged to have transpired through conduct of Wooster, who also served as one of 39 International vice presidents. (R. at 000216). Comeaux makes no specific complaint regarding the International in his Petition.

Wooster, reecived notification from Comeaux's doctor, Joe Trevino, that Comeaux was ". . . cleared for *full unrestricted return to duty*. He may return to full time duty as of January 2, 1992." (R. at 000161) (emphasis supplied).

In conformance with the releases from his doctors, Comeaux returned to work in January of 1992, working without complaint until his lay-off effective in October of that year. (R. at 000137-000138). Meanwhile, Local 455's financial position deteriorated, because of the impending loss of numerous members (and their dues) occasioned by the bankruptcy of Apple Tree. (R. at 000151). The financial difficulty of Local 455 during this period necessitated staff layoffs (R. at 000151). After deciding that he would have to lay-off Comeaux, Wooster made an informal inquiry to see if there were any openings at the International for which Comeaux might be considered, and learne there were none. (R. at 000147-151). Comeaux was notified of his lay-off, effective on 3 October, on 16 September 1992. (R. at 000443).

**B. Pertinent Procedural History.**

Comeaux filed this action in the United States District Court for the Western District of Texas on September 15, 1994. (R. at 000001). Comeaux complained of his lay-off from his position as an appointed business agent with Local 455 and of Local 455's and Wooster's failure to recall him for work. This was allegedly in retaliation for seeking the office of Local 455 president, in violation of the Labor Management Reporting and Disclosure Act ("the LMRDA"), 29 U.S.C. § 401, *et seq.*; the result of alleged discrimination against him by Respondents in violation of the Americans with Disabilities Act ("the ADA"), 42 U.S.C. § 12101, *et seq.*; and, the result of a conspiracy against him in violation of 42 U.S.C. § 1985

(3) ("Section 1985(3)"). (R. at 000001-000008). Respondents Local 455 and Wooster filed their answer on 6 December 1994, denying Comeaux's claims, and contending that Comeaux's Complaint failed to state a claim upon which relief could be granted. (R. at 000013-000017). Respondent International filed its answer on 1 March 1995, also denying all of Comeaux's claims, and alleging that Comeaux failed to state a claim upon which relief could be granted; that Comeaux failed to exhaust his internal and administrative remedies, and that Comeaux was not an employee of the International during any relevant period. (R. at 000022-000026).

Local 455 and Wooster filed their Motion for Partial Summary Judgment as to Comeaux's allegations under the ADA and the LMRDA on 2 January 1997. (R. at 000120). Local 455 and Wooster also filed a Motion for Partial Dismissal as to Comeaux's Section 1985 claims under FED. R. CIV. P. 12(b)(6) on 10 January 1997. The International filed its Motion for Summary Judgment on 17 January 1997. (R. at 000193). Upon stipulation of all parties, the district court entered a judgment of dismissal as to the ADA claim against the International on 24 January 1997 (R. at 000245). On 30 September 1997, the district court granted Summary Judgment as to Comeaux's ADA and LMRDA claims, and dismissed Comeaux's Section 1985 claims. (App. at 8).[3] Comeaux filed a Motion for New Trial on 24 October 1997 (R. at 000582). Comeaux's Motion for New Trial was denied on 25 November 1997 (R. at 000602). Comeaux filed his Notice of Appeal on 29 December 1997. (App. at 27; R. at 000604). On 2 October 1998, a panel composed of Circuit Judges Garwood, Jolly and Barksdale

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[3] Citations to "(App. at ——)" refer to the pages of the Appendix submitted with Comeaux's Petition.

issued a *per curiam* opinion affirming the district's court's summary judgment. (App. at 136). On 29 October 1998, Comeaux's Motion for Rehearing was denied *per curiam.* (App. at 138).

## SUMMARY OF THE ARGUMENT

Comeaux's LMRDA claims fail because he has no evidence that his termination impaired his rights as a union member (as distinct from depriving him of union employment). More specifically, Comeaux has not shown that his removal impaired his rights as a member to vote, seek office, or otherwise express his views, after the termination of his union employment. This Court's opinions in *Finnegan v. Leu* and *Sheet Metal Workers Int'l. Assn. v. Lynn*, are in fact dispositive of Comeaux's LMRDA claims.

Further, Comeaux's efforts to evade the effects of *Finnegan* and *Lynn*, by showing a ". . . purposeful and deliberate attempt to . . . suppress dissent within the union" are unavailing. In the first place, Comeaux presented no real evidence of such an effort. Moreover, events subsequent to Comeaux's termination indicate that the alleged effort by Respondents to suppress dissent existed primarily in Comeaux's imagination. In any case, the evidence that Comeaux belatedly points to is insufficient to create a fact issue as to the existence of any such effort to suppress dissent.

## REASONS FOR DENYING THE WRIT

Comeaux alleges that his lay-off by Wooster violated the "Union Members' Bill of Rights," 29 U.S.C. § 411-415, because it was part of a deliberate effort to suppress dissent within Local 455, despite the facts that the lay-off left Comeaux's membership in Local 455 unaffected; that

Comeaux campaigned in a three-way race for union office; and, that Comeaux freely spoke out on issues of importance to him. (Comeaux's Petition at 1-2; R. at 000416-000417, 000505, 000508).

**A. *Finnegan v. Leu* and *Sheet Metal Workers v. Lynn* Are Dispositive of Comeaux's Claims.**

Comeaux's LMRDA claim fails because, as the district court recognized, he has no evidence that his removal impaired his rights as a union member to vote, seek office or otherwise express his views, after the termination of his employment. (App. at 20-21).

Comeaux's effort to minimize the significance of *Finnegan v. Leu*, 456 U.S. 431, 102 S.Ct. 1867 (1982) are understandable, because *Finnegan* is in fact dispositive as to Comeaux's claims. (See Comeaux's Petition at 4). Congress's primary objective in enacting the LMRDA's "Bill of Rights of Members of Labor Organizations" was to ensure that:

> . . . unions would be democratically governed and responsive to the will of their memberships. Rank and file union members are granted rights under the Act to protect them from abuse of power by the union leadership. Union leaders, *per se*, are not themselves a protected class under this Act, except that they, too, may not be deprived of the basic rights attending on union membership.

*Adams-Lundy v. Association of Prof'l. Flight Attendants*, 731 F.2d 1154, 1156 (5th Cir. 1994) (emphasis in the original, quotation marks omitted) (citing *Finnegan*, 456 U.S. at 436-37, 102 S.Ct at 1870-71). The "Union Members Bill of Rights" was thus intended by Congress to protect ". . . rank and file union members—not union officers or employees as such." *Finnegan*, 456 U.S. at 438, 102 S.Ct. at 1871. "Discharge from union employ-

ment does not impinge upon the incidents of union membership, and affects union members only to the extent that they happen also to be union employees." *Id.*[4] Further, the Union Bill of Rights does not ". . . restrict the freedom of an elected union leader to choose staff whose views are compatible with his own." *Id.*, 456 U.S. at 441, 102 S.Ct. at 1973. *See also Rutledge v. Aluminum, Brick & Clay Workers Int'l. Union,* 737 F.2d 965 (11th Cir. 1984) (holding that LMRDA did not prohibit discharge for political reasons of union policy makers, and that *Finnegan* is applicable to union officials who formulate policies as well as those who implement them.); *Cehaich v. International Union, UAW*, 710 F.2d 234, 239 (6th Cir. 1983) (holding that union leaders have right to choose staff with ideas compatible to their own).[5]

Comeaux was laid off from his position as a Local 455 employee because of Local 455's weakened financial posi-

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[4] Comeaux contends that ". . . at least one District Court in the Fifth Circuit has held that where an employee wears two hats, that of rank-and-file member and appointed official, he is protected in his Article I rights." (Comeaux's Petition at 6, *citing Kirk v. Transportation Workers Union of America,* 934 F. Supp. 775-787-88 (S.D. Tex. 1995)). All that the cited portion of *Kirk* says is that the defendants, in addition to being union officers, were also union members entitled to protection of the Union Bill of Rights. *Kirk,* 934 F. Supp. at 787-88. The Respondents have never alleged that Comeaux does not have rights protected by the Union Bill of Rights —they simply contend that dismissing Comeaux from an appointed position, did not infringe on these rights.

[5] Comeaux mischaracterizes the holding in *Finnegan* when he argues that ". . . *Finnegan,* as well as all of its progeny . . . recogniz[e] that . . . a *new* President has the right to terminate the employment of appointed employees of the local union in order to choose a staff whose views are compatible with his own," (Comeaux's Petition at 1) (emphasis supplied, internal quotation omitted). This is a misreading of *Finnegan*—*Finnegan* does not specify a time period in which an union president, may, or may not, hire or appoint persons to positions within the union. *See Finnegan,* 456 U.S. at 441, 102 S.Ct. at 1867.

tion. (R. at 000148-000151). However, Comeaux was still a member of the Local—in fact, Comeaux, after his departure from Local 455 employment, began organizing political opposition to the incumbent, administration of Local 455. (R. at 000151-000155).[6] Comeaux himself states that he was ". . . actively in opposition to the Local leadership's action as a *member* of Local 455." (Comeaux's Petition at 2) (emphasis in the original). Given that, under *Finnegan*, Comeaux's lay-off would be perfectly permissible. Therefore, his LMRDA claim must fail. *Id.*, 456 U.S. at 441, 102 S.Ct. at 1873.[7]

*Sheet Metal Workers Int'l. Assn. v. Lynn*, 488 U.S. 347, 109 S.Ct. 639 (1989)—cited in the Petition as limiting *Finnegan*—is no help to Comeaux. In *Lynn*, the Court upheld a lower court finding that termination of an *elected* business agent violated the terms of the LMRDA. *Id.* 488 U.S. at 349, 359, 109 S.Ct. at 642, 647. However, the Court's opinion, (notwithstanding Justice White's concurrence, cited by Comeaux), clearly turned on the elected character of the plaintiff. *See id.*, 488 U.S. at 351, 355, 109 S.Ct. at 643, 644. Contrasting the *Lynn* case with *Finnegan*, the Court stated:

> The consequences of the removal of an *elected* official are much different. To begin with, when an

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[6] Comeaux engages in a substantial amount of double speak. On the one hand, Comeaux claims that Respondents admitted that he was ". . . not unloyal to Defendant Wooster, and was not insubordinate." (Comeaux's Petition at 2). Then Comeaux contends that he was ". . . actively in opposition to the Local leadership's action" and seeking the presidency of the Local against "Defendant Wooster's hand-picked successor," presumably while remaining "not unloyal." (Comeaux's Petition at 2, 3).

[7] "As a practical matter, the Union president should be able to work with those who will cooperate with his program and carry out his objectives." *Wambles v. International Bhd. of Teamsters*, 488 F.2d 888, 889 (5th Cir. 1974).

> elected official like Lynn is removed from his post, the union members are denied the representative of their choice. . . . Furthermore, the potential chilling effect on Title I free speech is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him.
>
> *Lynn.*, 488 U.S. at 355, 109 S.Ct. at 644-45. (emphasis supplied).

Unlike the plaintiff in *Lynn,* Comeaux was *not* an elected union official—but a representative appointed and working at the pleasure of the Local 455 president. (R. at 000364). Comeaux's Petition is disingenuous, as well as confusing, when it asserts that "Rather than the distinction between an elected and an appointed official, the only real distinction between Plaintiff's [Comeaux's] and Lynn's [situation] was that Lynn had been elected rather than appointed to the same position Plaintiff held. . ." (Comeaux's Petition at 4). The "only real distinction," minimized by Comeaux, is *precisely the point* upon which *Lynn* turned. *See Lynn*, 488 U.S. at 355, 109 S.Ct. at 644-45. Comeaux, by contrast, was not elected by the members to anything.

Comeaux contends the facts of *Thompson v. Office & Prof'l. Employees International Union*, 74 F.3d 1492 (6th Cir. 1995), *cert. denied sub nom.* 519 U.S. 993, 117 S.Ct. 482 (1996)—are "strikingly similar" to his case. (Comeaux Petition at 5-6). This is clearly erroneous. The plaintiff in *Tnompson*, Phillip Pope, was not only terminated from his position as a business representative—but also involuntarily removed from union membership. *Thompson*, 74 F.3d at 1497-99. Further, the international union ". . . maintained a trusteeship [over Pope's local] for the purpose of interfering with . . . [Pope's] . . .

free speech rights." *Id.* at 1500 (emphasis omittted). The Sixth Circuit Court of Appeals found that Pope was ". . . entitled to protection under the LMRDA *because he was* disciplined [by expulsion from union membership] *in a manner which affected his right to fully enjoy the rights and privileges of union membership.*" *Id.* at 1503 (emphasis supplied). In the matter at bar, Comeaux's union membership was *not* terminated—Comeaux exercised his right to vigorously participate in union affairs and even ran for union office, campaigning against the incumbent administration. (App. at 42; R. at 000304-000305, 000381, 000505, 000508).[8]

Clearly, under the *Finnegan* and *Lynn* analysis, Comeaux's lay-off may not be attacked via the "Union Bill of Rights."

**B. The Record Is Devoid of Evidence Suggesting That an Effort To Suppress Dissent Took Place, and Events Subsequent to Comeaux's Termination Show There Was No Such Effort.**

Comeaux further attempts to evade the effects of *Finnegan* and *Lynn* by claiming that he presented evidence below of a ". . . purposeful and deliberate attempt to . . . suppress dissent within the union." (Comeaux's Petition at 1-2, *citing Finnegan,* 456 U.S. at 441, 102 S.Ct. at 1873).

In the first place, precisely what would constitute a "deliberate effort to suppress dissent" remains undefined. "It seems clear that claims of infringement are judged

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[8] Comeaux appears to cite the *Thompson* case as evidence of a "conflict between the circuits." (Comeaux's Petition at 5-6). Respondents do not see a conflict between the *Thompson* case—or the other cases allegedly showing a "conflict"—and the decision of the district court and the Fifth Ciircuit, in this matter. The cases cited by Comeaux simply present different sets of facts.

by reference to the LMRDA's basic objective: to ensure that unions are democratically governed and responsive to the will of the union membership." *Harvey v. Hollenback*, 113 F.3d 639, 643 (6th Cir. 1997) (*quoting Lynn*, 488 U.S. at 354, 109 S.Ct. at 644). That objective was certainly met at Local 455.

Comeaux can repeat the mantra "purposeful and deliberate attempt to suppress dissent" as much as he likes, but the record is devoid of evidence suggesting that he was laid-off as part of any effort to suppress dissent. In fact, events after Comeaux's termination make this accusation of Petitioner's ludicrous. Comeaux, after his termination, attended union meetings; ran for union president; campaigned; and, continued to speak out on union issues that were important to him, without suppression. (R. at 000416-000417, 000505, 000508). The most powerful evidence that the alleged "effort to suppress dissent" existed only in Comeaux's imagination is Local 455's election results from November-December 1993. In that campaign, the other "anti-establishment" candidate for the presidency of Local 455, William H. Hopkins, in a three-way race which included Comeaux, defeated the incumbent administration that Comeaux accused of attempting to suppress dissent. (R. at 000304-000305, 000381, 000505-000508).

Comeaux cites *Schermerhorn v. Local 100, Transport Workers Union of America*, 91 F.3d 316 (2nd Cir. 1996), as a case similar to his ". . . where union officers are silenced in a scheme to suppress dissent . . ." (Comeaux Petition at 6-7). To begin with, the "silenced" officers in *Schermerhorn* were *elected* union officials, not appointed employees, such as Comeaux. *Schermerhorn*, 91 F.3d at 319. Moreover, the *Schermerhorn* plaintiffs were denied entrance to union meetings, restricted in their ability to circulate campaign materials, tried on trumped-

up charges for disrupting union meetings, and harassed repeatedly by additional charges of disrupting meetings and bringing personal attacks upon rival union leaders. *Id.* at 320-21. Comeaux, by contrast, was merely deprived of his union employment—but remained free to (and did) organize political opposition to the incumbent administration of Local 455. (R. at 000151-000155). Thus, Comeaux's case is nothing like *Schermerhorn.*

Finally, Comeaux contends that *Nixon v. United Food & Commercial Workers, Local 7*, 751 F. Supp. 1495 (D. Colo. 1990) is analogous to his situation. In *Nixon*, the district court found that the plaintiff, Nixon, raised a question of fact sufficient to survive summary judgment on the issue of whether her dismissal from her position as an appointed union business agent was part of a purposeful and deliberate attempt to suppress dissent within the union. *Nixon*, 751 F. Supp. at 1494-95. *Nixon* involved a particularly unusual set of facts including physical intimidation of an incumbent's opponents, and outright extortion. *Id.* at 1495. Moreover, in contrast to Comeaux, Nixon presented the district court with some arguable evidence to support her claims.

Specifically, Nixon presented affidavits from two opponents of the incumbent president's reelection effort, stating that the incumbent president had refused to provide severance pay to them unless they retired from union employment and signed written agreements that they would never again become involved in union affairs. *Id.* at 1495. Nixon also provided additional affidavits ". . . recounting acts and threats of retaliatory discharge, acts and threats of physical force and censorship of remarks by Mercer supporters during Union events." *Id.* The district court concluded that a jury could find "clear and convincing evidence" of a policy of "controlling disagreement." *Nixon* definitely involved a particularly egregious

set of facts, perhaps explaining why it is a stand-alone case—not followed or cited by any other court construing *Finnegan* or *Lynn*.

By contrast to the *Nixon* plaintiff, Comeaux's proffered evidence of a purposeful and deliberate effort to suppress dissent consists of unspecified excerpts from his own deposition, and the affidavit of Clara Jean Bane, a former Local 455 employee. (Comeaux's Petition at 2; App. at 44). Ms. Bane contends that her lay-off status was changed from temporary to permanent in December of 1992, after she expressed support for Comeaux's campaign for president of Local 455 to a co-worker. (App. at 48-49). Ms. Bane says that the co-worker had a "direct reporting relationship" to Respondent Wooster and she surmises that her remarks were reported to Wooster—and that this lead to the change in her lay off status. (App. at 49). By her own admission, then, Ms. Bane does not know that her remarks led to the change in her status—she merely conjectures that it did. In any event Ms. Bane was re-hired by Local 455 in January of 1994. (App. at 46). Significantly, there is no evidence that Ms. Bane's membership status or her ability to engage in union political affairs was in any way suppressed.

Both Bane's situation—and the degree of her knowledge of adverse action which may have been taken against her—are substantially different from the situation in *Nixon*—where the offending union president personally told employees that he would not provide severance packages for them, unless they retired; as well as personally extorting from them signed pledges to stay out of union politics. *Id.* at 1495. Neither Bane's affidavit, nor some unspecified deposition excerpts by Comeaux—could lead a reasonable jury to conclude "clear and convincing evidence" (the standard used by the *Nixon* court) existed of

a plan by Respondents to suppress dissent within Local 455.

## CONCLUSION

For all of the foregoing reasons, the grant of summary judgment by the district court, and its affirmance by the Fifth Circuit, should be upheld. Comeaux's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated 15 April 1999